TRENDS IN THE INTERPRETATION OF STATUTES

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1. SCOPE OF INVESTIGATION

The investigation on which I have been engaged is an examination of reported judgments for the purpose of discovering—

(a) Whether there can be found any changes in the approach of the Courts to the interpretation of legislation during the past twenty or thirty years:

(b) In particular, whether there is any evidence that the social and economic changes during that period and the development of the Welfare State, have had any effect on the judicial attitude to interpretation.

As part of the general question, the investigation has included the judicial attitude towards the prerogatives and immunities of the Crown.

2. THE JUDICIAL RULES OF INTERPRETATION

In any inquiry into possible trends in statutory interpretation there are two considerations to be borne in mind. The first is that in the process of interpretation the Courts are not applying rules of law, but canons of construction. Generally speaking, the rule of law applies where certain conditions exist, regardless of the intention of the parties; and it is followed and extended by a logical process of development from precedent to precedent. The canon of construction is merely a guide to what the Court should do to discover the apparent or presumed intention of Parliament, or of the parties to a document, in the absence of an expressed intention or of one that is implicit in the words used.(1)

The second consideration is that the existing canons and presumptions used by the Courts appeared at different times in the development of the legal system, over a period of several hundred years. Over that period, they reflect the steady growth of Parliamentary power, and show a gradual transition from the use of discretion by the Courts in the application of legislation that was not considered to be authoritative, and was presumed not to alter the common law, to the interpretation of an authoritative statement of law by Parliament. They may also be related to the fact that the form and content of statutes developed, with the social and economic changes over that period, from a statement of simple propositions to the laying down of more or less exact formulas in legislation that has become copious, more precise, hedged about with exceptions and provisos, and full of detail and administrative machinery.

The result is that the Courts now have at their disposal a heterogeneous collection of canons and presumptions, any of which can be applied at will in any given case. Those of later origin did not replace or overrule the earlier ones. They are all collected together in the text books on statutory interpretation (which are frequently referred to in judgments) and treated as having equal validity, regardless of the legal and social conditions in which they arose.

As C.K. Allen has said, "there is scarcely a rule of statutory interpretation, however orthodox, which is not qualified by large exceptions, some of which so nearly approach flat contradictions that the rule itself seems to totter on its base".(2)

Thus in the nineteenth and twentieth centuries there has been no uniformity in the application of the canons of construction to all statutes, and frequently there has been an absence of uniformity in their application to the same statute. While one Judge may in one case apply the "mischief" (or social policy) rule laid down in Heydon's Case, another Judge, or even the same Judge in another case, may apply the "literal" (or plain meaning) rule so popular in the latter part of the nineteenth century, or the older presumption that a penal Act or a taxing Act

must be strictly construed. Another may apply the ancient presumption that general words in an Act are not intended to alter the common law.

Apart from the presumptions, there are three main approaches used by the Courts. These have become generally known as the "literal rule", the "golden rule", and the "mischief rule".(3)

The "literal rule" is that "if the precise words used are plain and unambiguous . . . we are bound to construe them in their ordinary sense, even though it leads . . . to an absurdity or a manifest injustice": Abley v. Dale (1851), 11 C.B. 378, 391. Judges of course differ as to the "plain" meaning of words.

The "golden rule" is that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther": Grey v. Pearson (1857), 6 H.L.Cas. 61, 106. The first part of this rule thus repeats the "literal rule", and suffers from the same disadvantage. The second part creates a substantial exception to the "literal rule", and that exception leaves plenty of scope for difference as to what is an "absurdity".

The "mischief rule" is that laid down in Heydon's Case (1584), 3 Co. Rep. 7a. Under this rule, four things are to be considered: (a) What was the common law before the making of the Act? (b) What was the mischief and defect for which the common law did not provide? (c) What remedy Parliament has resolved and appointed to cure the disease of the Commonwealth; and (d) The true reason of the remedy; "and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . ."(4) This rule was said by Coke to be laid down by all the Barons of the

Exchequer "for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)." Thus, nearly four hundred years ago, the Courts were directed to look at the purpose and object of an Act and the reason why it was passed, and then to interpret its words in such a way as to give effect to that purpose and object. Clearly this is inconsistent with the "literal rule" and the "golden rule".

The "golden rule" is little used today (possibly because it leaves too much scope for the personal opinions of Judges). The Courts, on the whole, tend to apply the "literal rule" or the "mischief" rule. Alternatively, they may apply one of the presumptions.

It may be said at once that a careful examination of New Zealand cases does not disclose any evidence that the Judges generally tend to favour one approach rather than the others. One might expect that, as much legislation nowadays has a social purpose, the Courts would tend towards the use of the "mischief rule" (or its statutory equivalent in New Zealand) in the process of interpretation. But that is not the case. The conclusion reached by Willis in 1938, that "a Court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it", seems to be equally valid in New Zealand today. Also, as he points out, a Court does not assign any reason for choosing one rule rather than the other. In fact there are cases where it is far from clear just which rule the Court has applied.

This situation is illustrated by the cases mentioned under the following headings of this report.

First, however, it is necessary to deal with the influence (if any) exercised by the Acts Interpretation Act 1924 and its predecessors.

3. THE ACTS INTERPRETATION ACT 1924

This Act is of very great importance in the interpretation of legislation. It is a consolidation of the 1908 Act and its amendments, which in its turn replaced the Interpretation Act 1888 and its amendments. It applies to the interpretation of all Acts of the New Zealand Parliament, whether passed before or after 1924 (ss. 2, 3). It also applies to the interpretation of rules and regulations made under New Zealand Acts (see definition of "Act" in s. 4).

It contains much more than the equivalent Act of the United Kingdom does, though some of its provisions are based on that Act. It reverses a number of presumptions and judicial dicta, and is declaratory, in parts, of others.

It is a little startling to find that in recent years the Act has been less referred to than in the earlier decades of this century. In several recent cases, for example, the Supreme Court has failed to apply, or at least to consider the effect of, sections of the Act directly affecting the cases before it. In those cases it is obvious from the judgments that counsel had not cited the sections, and the conclusion is inescapable that neither counsel nor the Court was aware of their existence.

The first of these is Tawhiorangi v. Proprietors of Mangatu Nos. 1,3 and 4 Blocks (Incorporated), [1955] N.Z.L.R. 324, in which the Court applied the ancient rule that when an Act or part of an Act is repealed it must be treated as if it had never existed. This is quite contrary to s. 20 of the Acts Interpretation Act 1924.(5) Another case is Hookings v. Director of Civil Aviation, [1957] N.Z.L.R. 929. That case involved the much more important question whether the Governor-General in Council was prevented (by the maxim delegatus non potest delegare) from subdelegating to the Director of Civil Aviation any part of his power to regulate civil aviation. No mention was made of s. 2 of the Statutes Amendment Act 1945, which amends the Acts Interpretation Act and declares that no regulation is to be invalid on the ground that it confers on any person any discretionary authority.

Section 2 of the Statutes Amendment Act 1945 would also have been relevant in Ideal Laundry Ltd. v. Petone Borough, [1957] N.Z.L.R. 1038. In that case the validity of a town planning scheme was attacked on the ground that certain clauses gave to the Borough Council a discretionary power to dispense with requirements of the scheme. The Court held that the clauses were not ultra vires; but, as s. 33 (1) of the Town and Country Planning Act 1953 gives every operative scheme the force of a regulation, s. 2 of the Statutes Amendment Act would have been directly in point.

However, the most important, and the most neglected, provision of the Acts Interpretation Act 1924 is s. 5 (j), which applies "except in cases where it is otherwise specially provided". It is as follows:

> (j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

The provision is of paramount importance.(6) It applies to every kind of Act, including penal and taxing Acts. It bears such a close resemblance to the statement of "the office of all the judges" in Heydon's Case (as set out in section 2 of this report) that it appears to be a modern version of the mischief rule in statutory form; and it is such a positive direction to the Courts that, in spite of the frequent failure of counsel to cite it, one would expect the Courts to apply it in every case of ambiguity. It could be a potent instrument for giving effect to the social purpose of an Act. Yet it is used in a minority of cases. The Courts still turn to the English text books and the classic statements of the canons of construction in the English cases, forgetting that no such provision as our s. 5 (j) appears in the Interpretation Act of the United Kingdom.

There is a tendency to forget the blunt words of the Privy Council opinion in Smith v. McArthur, [1904] A.C. 389 (on appeal from the Supreme Court of New Zealand). Lord Lindley said at p. 398:

> . . . to adhere to language so literally as to defeat the plain intention of the Legislature instead of so construing the words as to give effect to that intention is to run counter to s. 5 (7) of the Interpretation Act [now s. 5 (j) of the Acts Interpretation Act 1924] which, after all, only expresses what is meant by the old legal maxim "Qui haeret in littera haeret in cortice".

However, the section is sometimes used to avoid a literal or technical construction.(7)

Another important paragraph in s. 5 of the Act relates to the rights of the Crown, and that is dealt with in the following section of this report.

4. THE CROWN

Any attempt made in New Zealand to hold that a statute of general application binds the Crown has been dominated by the following provision of the Acts Interpretation Act 1924 (or its predecessors):

> 5. The following provisions shall have effect in relation to every Act of the General Assembly, except in cases where it is otherwise specially provided:
>
> . . .
>
> (k) No provision or enactment in any Act shall in any manner affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby; . . .

(The underlining of the words "specially" and "expressly" is of course mine.)

Whenever it has been argued that an Act binds the Crown the Courts have naturally referred to this provision. This is in contrast with the numerous cases (not affecting

the rights of the Crown) where the Courts have applied common law presumptions or maxims or canons of construction when they should have applied provisions of the Acts Interpretation Act (for example, s. 5 (j) with its requirement of a fair, large, and liberal construction for all enactments). The reason no doubt is that the exemption of the Crown's rights and prerogatives from the effect of legislation is an ancient one, and has been part of the common law since Parliament asserted its authority to legislate. It is firmly embedded in the minds of all lawyers and judges.

The words of the section are plain and definite and will apply in the majority of cases. Nevertheless, the Crown Proceedings Act 1950, under which the Acts Interpretation Act binds the Crown, should now be taken into account. Under s. 2 of the Acts Interpretation Act every provision of that Act applies to every other New Zealand Act "except in so far as any provision hereof is inconsistent with the intent and object of any such Act, or the interpretation that any provision hereof would give to any word, expression, or section in any such Act is inconsistent with the context".

It can therefore be argued now that if there is a clear inference to be drawn from the intent and object of an enactment, or from its context, that Parliament intended the Crown to be bound, the enactment will apply to the Crown although it does not expressly say so. Read in the light of s. 2 of the Act, s. 5 (k) appears to be declaratory of the ancient common law presumption that the legislature does not intend to deprive the Crown of any prerogative, right, or property, unless it expresses that intention explicitly or makes the inference irresistible.(8) The basis of that presumption was that statutes express the combined will of Parliament and of the Crown (which must assent to Parliament's enactments), and that the Crown must not be held to surrender any of its rights except by express words or words showing a clear intention.

However, the leading cases on the subject were decided before the Acts Interpretation Act became binding on the Crown. The argument of irresistible inference (referred

to by our Courts as "necessary implication" or "reasonable or necessary intendment") was discussed, but generally not applied, in a series of cases in the nineteen-twenties. The first was In re Buckingham, [1922] N.Z.L.R. 771, in which the real question was whether the Chattels Transfer Act 1924 bound the Crown. If it did, then a security held by the Crown would be void, on the bankruptcy of the debtor, as regards certain stock-in-trade. Chapman J. held that the Act did not bind the Crown, so that its security was not affected. However, in referring to s. 6 (j) of the Acts Interpretation Act 1908 (now s. 5 (k) of the 1924 Act) he said, at 733:

> Many Acts, such as Land Acts and Mining Acts and others, involving the alienation of property and privilege of the Crown, might be found repugnant to this provision were it construed literally. In such cases it would be more proper to construe it as declaring that such Acts are not binding on the Crown unless by reasonable intendment the legislature has shown an intention that the Crown shall be bound.

In the following year, in Harcourt v. Attorney-General, [1923] N.Z.L.R. 686, the question arose whether the Court could give a declaratory judgment under the Declaratory Judgments Act 1908 in proceedings to which the Crown was a party. That Act allows anyone to apply to the Supreme Court for a declaratory order determining (inter alia) any question as to the construction of any enactment, where the applicant has done or desires to do something the legality of which depends on the construction of the enactment. The Court's order is binding on the parties to the proceedings as if it were a judgment in an action. In the case cited the question asked was whether it was lawful under the Gaming Act 1908 for a horse-race to be run in two heats with a separate prize for each heat, and without a final heat to decide an absolute winner. The Attorney-General did not admit that the Court had jurisdiction to make an order binding the Crown, but invited the Court to decide the question asked. Reed J. held that the Crown was bound by the Declaratory Judgments Act, because s. 6 (j) of the Acts Interpretation Act 1908 did not alter the common law rule, and therefore the Crown was bound by necessary implication. His Honour held that "rights",

in the section meant any part of the King's ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity, and that nothing in the Declaratory Judgments Act could be said to affect rights of that description.

Finally, in McDougall v. Attorney-General, [1925] N.Z. L.R. 104, it was argued by the Attorney-General, before the Court of Appeal, that the Declaratory Judgments Act did not bind the Crown. The Court's decision was limited to the point that in proceedings involving a monetary claim against the Crown (for the proper enforcement of which the procedure was laid down in the Crown Suits Act 1908), the Crown was not bound by the Declaratory Judgments Act, and no order could be made under it. But although the judges were unanimous on that point, the "necessary implication" rule was discussed. Stout C.J. relied on the express words of s. 6 (j) of the Acts Interpretation Act 1908; but he said that even if those words had not been there, no "necessary implication" could be found in the Declaratory Judgments Act (at p. 110). Sim J. was of the opinion (at p. 112) that the Court was not entitled to limit the operation of s. 6 (j) of the Acts Interpretation Act 1908 by a consideration of the common law rule on the subject. Herdman J. (at p. 115) approved the "reasonable intendment" principle stated by Chapman J. in Buckingham's case (supra). Reed J. elaborated on his judgment in Harcourt's case (supra), and strongly reiterated his general view as stated in that case. After referring to his interpretation of the word "rights" in the section of the Acts Interpretation Act, he said (at p. 119):

> It would be a curious commentary on the laws of what has been described as the most democratic part of His Majesty's Dominions to find that the prerogatives of the Crown (which here means to all intents and purposes the Executive Council) should be enlarged above that of England.

Reed J. then quoted the statement made in Bacon's Abridgement: "A general rule hath been laid down and established - viz., that where an Act of Parliament is made for the public good, the advancement of religion and justice,

and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him".(9)

As Friedmann has pointed out,(10) most modern statutes would come under one or other of the categories mentioned in the first sentence of the above quotation from Bacon's Abridgement. But the Courts have shown no sign of developing the principle stated in it. On the contrary, they have applied the more restrictive rule stated in the second sentence,(11) and have tended to the view that s. 5 (k) of the Acts Interpretation Act 1924 (and its predecessor) replaced a presumption by a positive and more limited statement of law.

However, the New Zealand Courts have shown no tendency to extend the protection of the "shield of the Crown" to public corporations set up by statute, deriving their revenue chiefly from public money, and carrying out functions of Government.(12)

Since the coming into force of the Crown Proceedings Act 1950 (on 1 January 1952) the legislative situation has altered. By that Act the Acts Interpretation Act 1924 (13) is declared to bind the Crown. That means that s. 5 (k) of the Acts Interpretation Act can now be read in the light of s. 2, and also of s. 5 (j), and it will be open to the Courts to reconsider the position of the Crown in a proper case. Moreover, Parliament has adopted a neutral attitude to the earlier division of opinion among the Judges on the question whether the "necessary implication" rule still lives. The wording of s. 5 (1) of the Crown Proceedings Act is consistent with the possibility that it does live, or may be revived. That subsection says that the Crown Proceedings Act shall not be construed so as to make any Act binding on the Crown which would not otherwise be so binding,(14) or so as to impose any liability on the Crown by virtue of any Act which is not binding on the Crown.

It is therefore possible that there may be a reconsideration of the Crown's position in future cases.

Meanwhile there is no evidence of any tendency to whittle down the rights and prerogatives of the Crown. Strong views on the practice of the Crown in embarking on trading and commercial activities in competition with its subjects, and then claiming preferential treatment, were expressed by Alpers J. in Tasman Fruit-Packing Association Ltd. v. The King, [1927] N.Z. L.R. 518, 532, 533, but they appear to have fallen on deaf ears.

5. PENAL ACTS

The old view that a penal enactment must be "strictly" construed has undergone a considerable change. It required that the offence charged must be brought within the strict letter of the law before the accused could be found guilty. Such an approach was no doubt necessary in earlier days in England when, according to the text books, the penalty for stealing a rabbit was transportation to the convict settlement in Australia; or earlier still, when the death penalty could be imposed for cutting down a cherry tree in an orchard or for being seen for a month in the company of gypsies.

The modern tendency in the English courts has been to construe penal enactments in the same way, and according to the same canons, as other kinds of enactments; except that in the case of two equally acceptable constructions the Court will prefer that which favours personal liberty. It will give the benefit of the doubt to the accused.(15)

In New Zealand, one would have expected the construction of penal enactments to be governed by s. 5 (j) of the Acts Interpretation Act 1924 (discussed in section 3 of this report). That paragraph expressly applies to every enactment whose purport is to punish the doing of anything Parliament deems contrary to the public good. There should therefore be no necessity for reference to the English rules.

In spite of that provision, however, which has been in our law since 1888, our Court of Appeal, in Clark v. Nicholson, [1949] N.Z.L.R. 1076, 1086, approved the statement of the English rule set out in Maxwell on Interpretation of Statutes (and paraphrased above) as the proper approach to the construction of a penal statute.

Apparently no one cited s. 5 (j) to the Court. Unfortunately, the statement of the rule in Maxwell is rather confused and contradictory, as Friedmann has pointed out.(16) The language of s. 5 (j) is clearer and more precise. Nearly forty years earlier, Chapman J. had no difficulty in applying it to a section dealing with the offence of street betting. (17)

Though this trend in the interpretation of penal statutes is clearly the result of changing ideas of crime and punishment, reflected in legislative changes, the modern attitude was well established in England by the end of last century, (18) and is not relevant to the period of our inquiry.

6. TAXING ACTS

As in the case of penal statutes, taxing Acts used also to be construed "strictly", and in favour of the taxpayer.

The present attitude of the New Zealand Courts still seems to be a cautious one, and approximates fairly closely to the rule adopted for the construction of penal acts. If there is any tendency at all, it seems to be towards giving the subject the benefit of the doubt where the language of the enactment is ambiguous.

In S.I.M.U. Insurance Association v. Fire Services Council, [1952] N.Z.L.R. 163, 185 (Fair A.C.J.), 191 (Hay J.) two of the three Judges in the Court of Appeal referred to the fact that the provisions of the Fire Services Act 1949 then under consideration were in the nature of, or closely analogous to, a taxing statute, and that the intention to impose the liability must be shown by clear and unambiguous language.

The decision of the Court of Appeal in Commissioner of Inland Revenue v. West-Walker, [1954] N.Z.L.R. 191, is, however, difficult to understand. S. 163 of the Land and Income Tax Act 1923 required every person, whether a taxpayer or not, to give to the Commissioner of Inland Revenue any information, and to produce any documents, required by him for any purpose relating to the administration or enforcement of any Act imposing taxes or duties. By a majority of four to one

the Court held that a solicitor was entitled to decline to give information relating to his client's affairs, or to produce documents, which would otherwise be protected by the common law privilege existing between solicitor and client, unless his client had previously assented to the disclosure. The main judgment is that of Fair J., who acknowledged that in revenue statutes far-reaching powers are given to public officers in order to prevent or detect evasions or breaches of the law. Nevertheless, he held that it was "consonant with reason and good discretion" (19) to consider that the common law principle affording special protection in respect of legal advice "was not intended to be invaded by the general provision in s. 163". Stanton J. dissented. He said that the section was obviously intended to alter the existing law, and to compel disclosure which the Commissioner could not otherwise obtain. He added that "No Court is justified in introducing limitations into statutes because it thinks, however strongly, that they should be there".

In the West-Walker case, the Court had before it a conflict between the clear and unambiguous words of an Act and a principle of the common law based on public policy.(20) It chose to read into the words of the Act a limitation preserving the common law privilege. The approach of Fair J. is in striking contrast to his statement of the effect and purpose of s. 5 (j) of the Acts Interpretation Act in United Insurance Co., Ltd. v. The King, [1938] N.Z.L.R. 885, 913. That section was not referred to by the Court.

7. SOCIAL PURPOSE AND OTHER ACTS

A study of the cases shows that on the whole there is a scrupulous following of the English authorities.(21) Moreover, the constant reference to the English text books on statutory interpretation has prevented the full and proper use of s. 5 (j) of the Acts Interpretation Act 1924 as the basic rule of interpretation.

It is no doubt for these reasons that no evidence has been found of any general tendency to take economic and social developments into account in deciding what approach

should be made to modern statutes with a social purpose.

There are of course exceptions to that general proposition. The decision of the Court of Appeal in the West-Walker case (supra), which read into the plain words of an Act a limitation preserving a common law privilege, may be contrasted with the judgment of Callan J. in New Zealand Breweries Ltd. v. Auckland City Corporation, [1938] N.Z.L.R. 428. By s. 13 of the Town Planning Act 1926, every borough with a certain population was required to prepare a town planning scheme and submit it to the Town Planning Board by a specified date (which had expired at the material time). By s. 34, any such borough council was authorised to refuse, at any time before the scheme was approved by the Town Planning Board, its consent to building and other work, on the grounds that the work would contravene the scheme if it had been completed and approved, or would contravene town planning principles. It was argued that the Auckland City Council could not use s. 34, because it had not in fact completed a scheme and submitted it for approval before the date specified in s. 13 of the Act. That argument was based on the proposition that unless s. 34 was read subject to that limitation the council could delay the completion of its scheme indefinitely, refuse consents under s. 34, and cause considerable interference with the common law rights of property owners. Callan J., in rejecting the argument, clearly had regard to the social purpose of the Act when he said:

> But considerable interference with the common law rights of property owners was plainly contemplated by the statute, and to make the interpolation or implication suggested in s. 34 would result in the distribution of this interference in an unjust and inconvenient manner. It would also put obstacles in the way of accomplishing a complete and coherent town-planning scheme.(22)

In Alford and Others v. Licensing Control Commission of New Zealand, [1954] N.Z.L.R. 479, 481, F.B. Adams J. said that s. 31 of the Licensing Amendment Act 1948, which gives jurisdiction to the Licensing Control Commission to cancel certain licences for the sale of liquor on being satisfied that they are not needed, is an expropriating and

confiscatory enactment, and that this would affect its interpretation if any ambiguity were found in it. This dictum was referred to by the Full Court in Embassy Liqueurs Ltd. v. Licensing Control Commission, [1955] N.Z.L.R. 734, 741 (Barrowclough C.J.), 749 (McGregor J.). That Court said that consideration might have to be given in the future to the question whether that view was correct, or whether the section "should not be regarded as remedial in the sense of endeavouring to effect something which Parliament deemed to be for the public good".

In Linford v. Stevenson, [1957] N.Z.L.R. 1112, Hutchison J. had to consider a regulation requiring vehicles used for the conveyance of bottled milk to be "so equipped as to protect the milk from the effect of the sun's rays". He held that the equipment must be so fitted or arranged that it actually protects the milk, and that the mere provision of equipment capable of doing so was not enough. His Honour referred to s. 5 (j) of the Acts Interpretation Act in justification of his conclusion, although the breach of the regulation was an offence.

In Nealon v. Public Trustee, [1949] N.Z.L.R. 148, the Court of Appeal set out to give effect to an enactment (s. 3 of the Law Reform Act 1944) that was obviously intended to alter the common law by making enforceable against the estate of a deceased person an express or implied promise to make testamentary provision in return for services rendered. Before that decision, the operation of the section had been severely restricted by a series of Supreme Court decisions.(23)

S.I.M.U. Insurance Association v. Fire Services Council, [1952] N.Z.L.R. 163 is a case where the Supreme Court and the Court of Appeal used different approaches. The association's comprehensive policies over motor vehicles covered liability to third parties, loss of or damage to a vehicle by accident, fire, or theft, medical expenses, and personal accidents to the insured. Cooke J., in the Supreme Court, used the "literal rule", and held that the association was an insurance company within the meaning of the Fire Services Act 1949, because it came within the definition of a company "carrying on the business of fire insurance (whether exclusively or

in conjunction with any other business)". Although that decision was justified by the words of the definition, the Court of Appeal allowed the appeal. It held that the association was not an insurance company for the purposes of the Fire Services Act, because it only covered fire risks as a subsidiary and insignificant part of its comprehensive policies. To come to this conclusion, which is undoubtedly a sensible one, the Court discarded the "literal rule" and used the "mischief rule".

Another striking example of the choice by the Court of the rule that "produces a result that satisfies its sense of justice" is to be found in the field of administrative law. In New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd., [1953] N.Z.L.R. 366, the Court of Appeal, by a majority of three to two, held void a zoning order by which the Okitu company was prohibited from collecting cream in an area that was formerly within its zone. The ground of the decision was that the Dairy Board had not conformed to the principles of natural justice because it failed to give the company notice of certain disputed matters and an opportunity to present its side of the case in respect of those matters. The majority (Northcroft, Finlay, and Cooke JJ.) distinguished the decision of the Privy Council in Nakkuda Ali v. Jayaratne, [1951] A.C. 66 on grounds that may be thought rather slender.(24) The remaining Judges (Sir Humphrey O'Leary C.J. and Hutchison J.) based their dissent on the ground that the Nakkuda Ali case was binding and indistinguishable on the facts.

8. SUMMARY OF CONCLUSIONS

The conclusions in this report may be summarized as follows:

(a) There is no evidence that the Courts tend to favour any particular approach to the interpretation of all statutes.

(b) The "fair, large, and liberal construction" rule laid down by s. 5 (j) of the Acts Interpretation Act 1924 is not applied in all cases. It is not even applied in a majority of cases. Other rules laid down by that Act are

not always applied when they should be. It need hardly be said that the responsibility for this situation rests mainly on counsel.

(c) The exception to the propositions stated in paragraph (b) (above) is s. 5 (k) of that Act, which has been applied as a positive statement of law preventing any general enactment from binding the Crown in the absence of express words to the contrary. The common law principle that the Crown may be bound by necessary implication is apparently excluded. It is suggested, for the reasons set out in section 4 of this report, that the Courts now have the opportunity, in proper cases, to revive the "necessary implication" principle.

(d) Generally speaking, the New Zealand Courts follow the dicta of the English judges, and refer mainly to the English text books on interpretation. Their attitude to penal and taxing enactments is accordingly similar to that of the English Courts.

(e) There is no evidence that the social and economic changes during the past twenty or thirty years, and the development of the Welfare State, have had any significant effect on the judicial attitude towards the interpretation of statutes.

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(1) See Fry L.J. in In re Coward (1887), 57 L.T. 285, 291; Bowen L.J. in Earl of Jersey v. Guardians of the Poor (1889), 22 Q.B.D. 555, 561, 562.
(2) Law in the Making (5th ed.), 494.
(3) Cf. Willis, "Statute Interpretation in a Nutshell" (1938), 16 Canadian Bar Rev. 1.
(4) See, for an example of the use of this rule, Christie v. Hastie, Bull, and Pickering Ltd., [1921] N.Z.L.R. 1.
(5) Discussed by D.A.S. Ward, in "Interpretation of Statutes: The Effect of a Repeal (1955), 31 N.Z.L.J. 248.
(6) Fair J. in United Insurance Co. Ltd. v. The King, [1938] N.Z.L.R. 885, 913.

(7) Hutton v. Hutton (1910), 13 G.L.R. 201; In the Estate of Rangi Kerehoma (deceased), [1924] N.Z.L.R. 1007; Brown v. McNeil, [1930] N.Z.L.R. 511; Dwyer v. Hunter, [1951] N.Z.L.R. 177, 180.
(8) Willion v. Berkley (1562), 1 Pl.Com. 223, 240.
(9) Bacon's Abridgment, 7th ed., Vol. VI, p. 462; Cf. Case of the Ecclesiastical Persons (1601), 5 Co. Rep. 14 a; Magdalen College Case (1616), 11 Co. Rep. 70 b; R. v. Archbishop of Armagh (1721), 1 Str. 516.
(10) Law and Social Change in Contemporary Britain, 267.
(11) Cf. Andrew v. Rockell, [1934] N.Z.L.R. 1056.
(12) Southland Boys' and Girls' High School Board v. Invergarcill City Corporation, [1931] N.Z.L.R. 881; McCallum v. Official Assignee of Sagar and Lusty, [1928] N.Z.L.R. 292; Smith and Smith Ltd. v. Smith, State Advances Corporation, [1939] N.Z.L.R. 588.
(13) And a number of other Acts, including the Declaratory Judgments Act 1908.
(14) This part of the subsection re-enacts s. 7 of the Crown Suits Amendment Act 1910. That Act extended the kinds of claims that could be made against the Crown.
(15) Paraphrasing Maxwell on Interpretation of Statutes (10th ed.) 284, 285.
(16) Law and Social Change in Contemporary Britain, 244.
(17) Hutton v. Hutton (1910), 13 G.L.R. 201. See also Linford v. Stevenson, [1957] N.Z.L.R. 1112, 1114.
(18) Dyke v. Elliott, The Gauntlet (1872) L.R. 4 P.C. 184, 191; Tuck v. Priester (1887), 19 Q.B.D. 629, 638; Remmington v. Larchin, [1921] 3 K.B. 404, 408 (Bankes L.J.), 409 (Scrutton L.J.), 411 (Atkin L.J.).
(19) Citing Stradling v. Morgan (1560), 1 Pl.Com. 199.
(20) See Lord Halsbury in Bullivant v. Attorney-General for Victoria, [1901] A.C. 196, 200.
(21) Cf. B.J. Cameron "Law Reform in New Zealand" (1956), 32 N.Z.L.J. 72.
(22) p. 432. Cf. Wong v. Northcote Borough, [1952] N.Z.L.R. 417.
(23) Bennett v. Kirk, [1946] N.Z.L.R. 580; McAllister v. Public Trustee, [1947] N.Z.L.R. 334; Ace v. Guardian Trust and Executors Co. Ltd.,

[1948] N.Z.L.R. 103; Nealon v. Public Trustee, [1948] N.Z.L.R. 324, S.C. See I.D. Campbell, "Promises to Make Testamentary Provision" (1947), 23 N.Z.L.J. 221, 235; H.F. von Haast, "Promises to Make Testamentary Provision" (1948), 24 N.Z.L.J. 76.

(24) Cf. Davis, "Must a Licensing Authority Act Judicially" (1956), 32 N.Z.L.J. 360. That article is an admirable discussion of the present confusion in the attitude of the Courts towards "administrative" and "quasi-judicial" bodies, and summarizes the effect of the cases.